



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 18, 1996

Mr. Mark C. Goulet  
Walsh, Anderson, Underwood, Schulze  
& Aldridge, P.C.  
6300 La Calma, Suite 200  
Austin, Texas 78768

OR96-0572

Dear Mr. Goulet:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 37783.

Center Point Independent School District (the "district") received a request for a district counselor's records concerning two named children. The requestor is an attorney who apparently represents the children's father. The requestor has also supplied authorizations from the children's mother for release of records concerning herself or the children. You contend that the counselor's notes are excepted from disclosure pursuant to section 552.101.

You acknowledge that the Family Educational Rights and Privacy Act ("FERPA"), title 20 of the United States Code, section 1232g, provides parents an affirmative right of access to their children's education records. Education records are those records that "contain information directly related to a student and are maintained by an educational agency or institution." 20 U.S.C. § 1232g(a)(4)(A). Section 552.114 of the Government Code also provides for a student's education records to be released to a student's parents.

However, you state that the counselor's notes are excepted from the definition of education records as

records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.

20 U.S.C. § 1232g(a)(4)(B)(i).

Based on the information provided and your assertions, we assume that the counselor's notes are not education records under FERPA.<sup>1</sup> That does not end the inquiry, however.

Section 552.002 of the Government Code provides that information is generally public if it is collected, assembled, or maintained under a law, ordinance, or in connection with the transaction of official business (1) by a governmental body or (2) for a governmental body and the governmental body owns the information or has a right of access to it. The notes were made by the counselor in her work capacity and apparently are kept for work use. *See* Open Records Decision No. 626 (1994) (notes taken by members of departmental promotion board as aid in evaluating candidates were subject to Open Records Act). Since the counseling notes at issue here were created and maintained in connection with the transaction of official business, they would generally be subject to the provisions of chapter 552. *See* Open Records Decision No. 450 (1986) (written observations of appraisers concerning teacher's job performance, used to document the written report, are subject to Open Records Act).

As you assert that the notes at issue are excepted from disclosure pursuant to section 552.101, we assume that your assertion is that the notes are either excepted from disclosure pursuant to the common-law privacy aspect of section 552.101 or that they are excepted from disclosure under section 611.002 of the Health and Safety Code. Section 611.002(a) provides that "communications between a patient and a professional, and records of the identity, diagnosis, evaluation or treatment of a patient that are created or maintained by a professional, are confidential." *See Id.* § 611.001 ("professional" includes "a person the patient reasonably believes is authorized, licensed, or certified"). Section 611.002(b) provides that such records may not be disclosed except as provided under sections 611.004 and 611.045. *See also* Open Records Decision No. 598 (1991) (statutory access provisions govern release of records).

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<sup>1</sup>We note that this office recently issued Open Records Decision No. 634 (1995), which concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

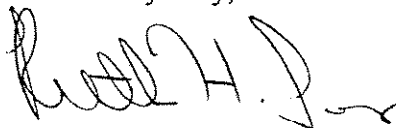
We also note that this office has previously been advised by the United States Department of Education that while FERPA does not require the release of notes that are in the sole possession of an educator, FERPA also does not prohibit the release of such notes. In that letter, the Department of Education also points out that once parents have had access to such notes, the notes no longer fall within the FERPA exception. A copy of that letter is enclosed.

We are unable to determine from the facts provided whether the notes at issue are subject to section 611.002. We note, however, that sections 611.004(a)(4) and 611.0045(f) provide that the content of a confidential record must be made available to a parent of a minor patient who is acting on the patient's behalf. If the notes at issue are subject to section 611.002, the district should determine if the requestor is acting on behalf of the patients for purposes of section 611.0045(f).

If the notes are not subject to section 611.002, we agree that they are confidential under common-law privacy. Information is excepted from disclosure by a common-law right of privacy under section 552.101 if the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) *cert. denied*, 430 U.S. 930 (1977). However, section 552.023 of the Government Code provides that "a person's authorized representative" has a special right of access to information that is protected from public disclosure by common-law privacy.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 37783

Enclosures: Submitted documents  
U.S. Department of Education letter

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(w/o enclosures)